Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-168

JOHN W. WHITEHEAD and ROBERT YOUNG,

Appellants,

—v.—

DARLENE WESTBROOK, City Clerk,
City of Fayetteville, Arkansas,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Western District of Arkansas, entered on May 21, 1975, dismissing the complaint with prejudice, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The memorandum opinion of the three-judge United States District Court for the Western District of Arkansas is not yet reported. It is set out in the Appendix, infra., p. 1a .

JURISDICTION

This suit was brought under 28 U.S.C. §§1343, 2201, 2202, 2281 and 2284, 42 U.S.C. §1983, and the Fourteenth Amendment to the Constitution of the United States, to declare unconstitutional and to enjoin enforcement of certain provisions of Arkansas Statute 19-704(f). The judgment of the three-judge District Court holding the statute constitutional under the Fourteenth Amendment and ordering the complaint dismissed with prejudice was entered on May 21, 1975. Notice of appeal to the Supreme Court of the United States was filed in the United States District Court for the Western District of Arkansas on June 25, 1975.

The jurisdiction of the Supreme Court to review this decision and order by direct appeal is conferred by 28 U.S.C. §1253. The following decisions, among many, sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: Bullock v. Carter, 405 U.S. 134 (1972); Turner v. Fouche, 396 U.S. 346

(1970); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

STATUTE INVOLVED

Arkansas Statute 19-704(f) provides:

> "At any general or special election for the election of a Director or Directors, any adult person who has resided within the municipality for at least six (6) months, and is qualified to vote at an election of county or state officers, shall be deemed a qualified elector; and any person (more than 30 years of age) possessing these same qualifications also shall be eligible to run for the office of Director."

QUESTIONS PRESENTED

1. Whether the portion of Arkansas Statute 19-704(f), which sets a minimum age of 30 years for candidates for the office of City Director, violates the Equal Protection Clause of the Fourteenth Amendment?

2. Whether the Equal Protection Clause of the Fourteenth Amendment is violated by the Arkansas statutory scheme which requires a minimum age of 30 years

for candidates for the office of City Director in cities which have adopted the city manager form of government, and sets no minimum age requirement for candidates for City Council in cities which utilize the mayor-council form of government?

STATEMENT OF THE CASE

The appellants are citizens and qualified electors of the City of Fayetteville, Arkansas, a city organized under the city manager form of government. Appellee is the City Clerk of Fayetteville. On or about September 27, 1974, appellee refused to certify appellant Whitehead as a candidate for City Director in the general election of November 5, 1974, solely on the ground that Whitehead would not have attained the age of 30 years by January 1, 1975 (when Directors elected at the general election take office); Whitehead at that time was 28 years old. This suit was filed on September 30, 1974. On October 1, 1974 a hearing was held on a request for a temporary restraining order to place appellant Whitehead's name on the ballot. The request was denied. Thereafter, the complaint was amended to include appellant Young as a party plaintiff. Young is 22 years of age, a qualified elector of Fayetteville, and an announced candidate for City Director at the 1978 general election. Defendant, in her answer, admitted all the factual allegations in the amended complaint.

On or about October 22, 1974 a three-judge District Court was designated to hear the case. The parties then entered into the record a stipulation to dispense with the taking of evidence. The stipulation establishes that ten cities in Arkansas are organized under the city manager form of government. These cities range in population from 5,275 to 132,483 (1970 U.S. Census), with Fayetteville having a population of 31,915. By contrast, thirty-two Arkansas cities with a population greater than 5,000 have the mayor-council form of government (ranging in population from 5,085 to 60,040). The total population of all cities having the city manager form of government is 304,419 (including one city that has the city administrator form, which also requires a minimum age of 30 years for Directors), while the total population of all cities over 5,000 having the mayor-council form of government is 501,325. Further, the stipulation establishes that no age limitation is placed on candidates for Mayor or Councilman in cities having that form of government.

The three-judge District Court found the Arkansas statute setting 30 years as a qualification for candidacy on the Board of Directors of city manager cities valid.

The court rejected appellants' argument that the age qualification should be treated as either a suspect criterion or interference with a fundamental right so as to require appellee to demonstrate a compelling state interest for the age requirement. Furthermore, the court rejected the argument that under the traditional equal protection test, the statute violated the Fourteenth Amendment because of the lack of any rational basis for distinguishing between Directors of city manager cities, who must be 30 years of age to run, and Councilmen of mayor-council cities, who may run for office at age 18.

THE QUESTIONS ARE SUBSTANTIAL

1. The District Court erred in refusing to give close judicial scrutiny to a state statute which precludes the candidacy of a large class of electors otherwise qualified to run, but for their age.

This Court has made clear that the right to vote "for the candidate of one's choice is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government," Reynolds v. Sims, 377 U.S. 533, 555 (1964). Application of this principle to restrictions upon candidacy was emphasized in Powell v. McCormack, 395 U.S. 486, 547 (1969), where the Court noted that "this principle is undermined

as much by limiting who the people can select as by limiting the franchise itself." Quite simply, any restriction on candidacy is "'heavily burdened'...when other candidates are clamoring for a place on the ballot." Lubin v. Panish, 415 U.S. 709, 716 (1974).

The District Court, disregarding the fundamental nature of the right to vote, held that age requirements for candidacy do not fall into the group of suspect criteria, such as race or alienage, so as to invoke close judicial scrutiny. Appellants agree that classification based on age has not clearly been held by this Court to be a suspect criterion. Cf. Weisbrod v. Lynn, ___U.S.___, 43 L.Ed. 2d 420 (1975), with Massachusetts Board of Retirement v. Murgia, 376 F.Supp. 753 (D. Mass. 1974), juris. noted, 43 U.S.L.W. 3613 (May 20, 1975). However, the decisions of this Court indicate that the right to be a candidate for public office is so closely connected with the fundamental right to vote, that close judicial scrutiny is required of impediments to the right of candidacy.

The District Court misconstrued Bullock v. Carter, 405 U.S. 134 (1972), as being based solely on wealth as a suspect classification; the District Court overlooked the holding of Bullock which

tied candidacy to the voter's right to vote for the candidate of his choice. This aspect of Bullock is reinforced by Lubin v. Panish, 415 U.S. 709 (1974), which struck down the California filing fee scheme which was purportedly designed to prevent "laundry list" ballots in primary elections, with insincere or non-serious candidates. In Lubin the Court expanded upon Bullock and indicated that it was not merely the wealth of the potential candidate which required close judicial scrutiny under the equal protection clause: "The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters." 415 U.S. at 716.

When the right of candidacy is viewed as a part of the right of franchise, this Court commands that close scrutiny be given to limitations on the right. Dunn v. Blumstein, 405 U.S. 330 (1972); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Reynolds v. Sims, 377 U.S. 533 (1964).

Not only did the District Court refuse to closely scrutinize the inordinately high age requirement at issue in this

case, but it compounded its error by suggesting that any limitations on candidacy which are not based on recognized suspect criteria (presumably race, alienage, legitimacy of birth, and perhaps sex) will be exempt from equal protection inquiry. This suggestion is precisely opposed to the thrust of Lubin v. Panish, where the Court pointed out, 415 U.S. at 713, that recent decades have seen a shift in emphasis from restricted ballots to an expansion of political opportunity, demonstrated by the Twenty-fifth and Twenty-sixth Amendments, the Voting Rights Act of 1965 and the enlargement of equal protection clause theory as applied to voting rights. Furthermore, the District Court specifically rejected appellants' argument that the Twenty-sixth Amendment, by setting eighteen as the age of eligibility for voting, requires the courts to give close scrutiny to candidate qualifications which automatically disable otherwise qualified electors from running for public office.

An important aspect of the instant case is whether the Twenty-sixth Amendment, when coupled with the equal protection clause, establishes a national policy on age-eligibility for voting which also dictates review of the "crazy-quilt" pattern of varying age requirements for candidacy. Under the facts in this case, for example, appellant Whitehead, at the time of the November, 1974 general election, would have been age-qualified to run for United

States Congressman (age 25), Arkansas Senator (age 25), Arkansas Representative (age 21), Circuit Judge (age 28), County Judge (age 25), Chancery Judge (age 28), Municipal Judge (age 25), and for the following state offices which have no age qualification: Secretary of State, Auditor, Treasurer, Attorney General, Prosecuting Attorney, Justice of the Peace, County Assessor, Coroner, Recorder, Sheriff, Surveyor, and Treasurer.

In light of the application of strict scrutiny review of state impediments to candidacy for office, and the national policy expressed in the Twenty-sixth Amendment, the age requirement at issue here cannot be sustained under the Fourteenth Amendment.

2. The District Court erred in finding a rational basis for a statutory scheme which requires city directors to be 30 years of age in some cities while allowing mayors and city councilmen in other cities to serve at age 18 years.

The Arkansas statutory scheme arbitrarily classifies the elected governing bodies of cities into two classes: Directors of cities having the city manager or city administrator form of government, in which the Directors must be 30 years of age to qualify for office, and all other cities, which have the mayor-council form

of government and no age qualification for candidacy. This age classification cannot withstand even the rational basis standard of review.

As was emphasized earlier this term in Weinberger v. Wiesenfeld, ____U.S.____, 43 U.S.L.W. 4393, 4397, n. 19 (March 19, 1975), the Court cannot "accept at face value assertions of legislative purpose, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. See, Eisenstadt v. Baird, 405 U.S. 438 (1972); Jimenez v. Weinberger, 417 U.S. 628, 634 (1974); U.S. Department of Agriculture v. Moreno, 413 U.S. 528, 536-537 (1973)." Moreover, as noted in Moreno, even a valid legislative goal which operates "to harm a politically unpopular group cannot constitute a legitimate governmental interest," 413 U.S. at 534 (emphasis in original).

The District Court found Arkansas Statute 19-704(f) valid under the traditional equal protection test by reasoning that the legislature could rationally have found that different forms of city government may require different standards of candidate qualification. More specifically, the District Court reasoned that Directors of city manager cities in Arkansas are charged with the responsibility of selecting and supervising a city manager, which duty might call for more than

minimal experience and maturity. Not only is this reasoning entirely specious, but the source of the reasoning was an unsupported allegation culled from the defendants' trial brief in the District Court. In accepting the defendants' unsupported allegation, the District Court overlooked two important aspects of the legislative scheme which demonstrate that different age qualifications for City Directors and City Councilmen are particularly irrational. First, although City Directors are charged with the duty of hiring and supervising a City Manager in mayor-council cities, the mayor and councilmen themselves perform the functions which the City Manager performs in city manager cities. To say that the legislature might have concluded that only mature and experienced individuals should serve to hire and supervise someone else, while "immature" and "inexperienced" people (those between 18 and 30 years old) may run for office and perform those tasks is simply not rational. Second, in city manager cities, the qualifications of a City Manager nowhere include age, so that the hired executive of a city may be under 30 years of age, but the elected Directors must be over 30. By contrast, in the mayor-council cities, the Mayor, as elected executive, and the elected Councilmen may all be under 30 years of age. The District Court clearly erred in finding that an age qualification for City Director under this statutory scheme might have a rational

basis.

If the Arkansas legislature had prescribed a minimum age for all elected members of city governing bodies in the state, then the traditional equal protection test might have been satisfied. However, to say that the voters in an Arkansas city that chooses to be governed by the city manager form of government must perforce give up part of their right to be represented by candidates of their choice because of an arbitrary age qualification, surely violates equal protection.

CONCLUSION

For the reasons set forth above, the Court should note jurisdiction.

Respectfully submitted,

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July 1975

APPENDIX

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JOHN W. WHITEHEAD and ROBERT YOUNG,	)	
Plaintiffs,	)	
v.	)	No. F-74-41-C
DARLENE WESTBROOK, CITY CLERK, CITY OF FAYETTEVILLE, ARKANSAS,	)	
Defendants.	)	

MEMORANDUM OPINION

In this proceeding, complaint was originally filed by plaintiffs, John W. Whitehead and David Colston, on September 30, 1974. The thrust of plaintiffs' complaint seeks declaratory judgment invalidating Act 99, Sec. 4, of the General Assembly of Arkansas, as amended (Ark. Stats. Anno. 1947, Sec. 19-704(f)[1/], 1968

1/ Ark. Stats. Anno. 1947, Sec. 19-704(f), provides:

> "(f) At any regular or special election for the election of a Director or Directors, any adult person who

Replacement), as in violation of the Fourteenth Amendment of the Constitution of the United States insofar as the statute sets a minimum age qualification for the office of city director of Fayetteville, Arkansas.

Jurisdiction is invoked under 28 U.S. C. Sec. 1343. With the filing of the complaint, a request was made for the convening of a three-judge district court pursuant to 28 U.S.C. §§2281 and 2284. The plaintiffs also requested a temporary restraining order directing the defendant City Clerk of the City of Fayetteville, Arkansas, to accept their proffer of candidacy as a director at the then ensuing general election, 1974. On October 1, 1974, Chief Judge Paul X Williams conducted a hearing on the motion for temporary restraining order after which the motion was denied. On October 22, 1974, The Honorable Floyd R. Gibson, Chief Judge of the Court

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(footnote continued from previous page)

> has resided within the municipality for at least thirty (30) days, and is qualified to vote at an election of county or state officers, shall be deemed a qualified elector; and any person (more than 30 years of age) possessing these same qualifications also shall be eligible to run for the office of Director."
> (Emphasis Added)

of Appeals for the Eighth Circuit, by request, designated The Honorable William H. Webster, Circuit Judge, Honorable Oren Harris, District Judge, and Honorable Paul X Williams, Chief District Judge, Western District of Arkansas, to conduct the three-judge district court in the case.

The original complaint alleged that plaintiffs, Colston and Whitehead, were registered voters and announced candidates for positions on the Board of Directors of the City of Fayetteville, Arkansas, and that they met all qualifications for candidacy except that each had not yet reached the age of thirty (30) years, they each being age twenty-eight (28), and that on or about September 27, 1974, the defendant city clerk refused to certify plaintiffs as candidates solely on the ground that they would not have attained the age of thirty (30) years by January 1, 1975, when directors elected at the general election on November 5, 1974, would take office.

Subsequent to the denial of the motion for temporary restraining order and the occurrence of the general election, an amended complaint was filed on November 7, 1974. By the amended complaint, the plaintiff David Colston, was dropped as a party and the plaintiff Robert Young was added. Plaintiff, Robert Young, alleges that he is a registered voter, a resident of the City of Fayetteville, and meets all the qualifications for candidacy for the office of

city director. He alleges that he is twenty-two (22) years of age, an announced candidate for a position on the Board of Directors of the City of Fayetteville at the 1978 general election, and that he will not have attained the age of thirty (30) years by January 1, 1979, when directors elected at the 1978 general election take office.

Defendant, by answer, admits all of the factual allegations of the amended complaint. The parties have filed a joint stipulation to dispense with the taking of evidence as the facts are not in dispute. Counsel for the parties have filed excellent pre-hearing briefs. The matter was heard by the three-judge district court on February 21, 1975, following which hearing, the cause was submitted and taken under advisement.

In addition to the admitted factual allegations of the amended complaint, the parties stipulate that the City of Fayetteville, Arkansas, is one of ten cities in the State of Arkansas organized under the city manager or city administrator form of government. These cities have populations ranging from 5,275 to 132,483, with Fayetteville having a population of 31,915. It is also established that thirty-two Arkansas cities having a population over 5,000 are organized under a mayor-council form of government. There is no minimum age

qualification for members of the city council other than being a qualified voter in those cities having a mayor-council form of government, but the challenged statute requires that members of the Board of Directors of cities organized under the city manager form must be more than thirty (30) years of age.

It is further stipulated that the Constitution and statutes of the State of Arkansas provide for minimum age qualifications for the offices of Governor (30), Lieutenant Governor (30), state senator (25), state representative (21), Justices of the Supreme Court (30), circuit and chancery court judges (28), county judges (25), municipal judges (25), and we take judicial notice that the Constitution of the United States provides for minimum age qualifications for the offices of President (35), senator (30) and representative (25).

Plaintiffs contend that the minimum age qualifications of the challenged statute and minimum age qualifications, or lack thereof, for other elective offices create a "crazy quilt pattern" of qualification which is arbitrary and unreasonable, that the selection of minimum age thirty (30) for the office of city director is arbitrary and unreasonable, and that the minimum age requirement of the challenged statute is violative of the Equal Protection Clause of the Fourteenth Amendment.

No question is raised as to jurisdic-

tion. Jurisdiction is established pursuant to 28 U.S.C. §§1343, 2281 and 2284.

It is horn book law that requires no citation that the burden is on the plaintiffs to establish the allegations of the Complaint.

Plaintiffs urge that an age qualification should be treated as a "suspect criterion" for candidacy, seeking to equate age with classifications based on race or wealth which might invade or restrain voting rights. Such factors have been held to render a classification highly suspect and thereby demand a more exacting scrutiny. Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); McDonald v. Board of Election, 394 U.S. 802 (1969). Plaintiffs urge that the challenged statute should be upheld only upon a showing of a compelling state interest, as opposed to the usual and traditional test of such legislation.

In Bullock v. Carter, 405 U.S. 134 (1972), the Supreme Court considered a series of statutes of the State of Texas which required candidates for local and state offices to pay prohibitively high filing fees in order to qualify as candidates in party primary elections. The Court there stated that it had not before attached such fundamental status to candidacy as to invoke a rigorous standard of

review, citing its application of the traditional test, rather than the compelling interest test, in Turner v. Fouche, 396 U.S. 346 (1970). Although, the Court went on to apply the compelling interest test in Bullock, it is clear that the more stringent standard was applied only because the Court found that the excessively high filing fee requirement had a real and appreciable impact on the exercise of voting rights, not candidacy, in that the requirement resulted in a reduction in the effectiveness of participation by persons of lesser means in the elective process solely on the basis of relative wealth.

We do not perceive any such invidious effect of the challenged age qualification for candidacy on voting rights. Certainly the statute falls with equal effect on rich and poor, and there is no hint of racial consideration. Inasmuch as the Supreme Court has only applied the compelling interest standard to candidacy for public office when it has found a direct and discriminatory effect on voting rights, or that restrictions on candidacy resulted in discrimination on the basis of race or relative wealth, we think the usual and traditional standard should apply in the case at bar. This standard is clearly stated in McDonald v. Board of Election, supra, as follows:

> "Though the wide leeway allowed by the Fourteenth Amendment to

enact legislation that appears to affect similarly situated people differently, and the presumption of statutory validity that adheres thereto, admit of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." 394 U.S. 802, 808.

This conclusion is reinforced by numerous lower court cases holding that the traditional standard should be applied in testing classifications based upon age. Manson v. Edwards, 482 F.2d 1076 (6th Cir. 1973), reversing 345 F.Supp. 716 (E.D. Mich. 1972); Human Rights Party of Ann Arbor v. Secretary of State, 370 F.Supp. 921 (E.D. Mich. 1973); Blassman v. Markworth, 359 F.Supp. 1 (N.D. Ill. 1973); see Raza Unida Party v. Bullock, 349 F. Supp. 1272, 1283 (W.D. Tex. 1972), aff'd in part, on other grounds, sub. nom. American Party

of Texas v. White, 415 U.S. 767 (1974).

Plaintiffs argue that when the age qualification of the challenged statute is compared with minimum age requirements or lack thereof for other municipal, state and federal offices, the age limitation of thirty (30) years as a requirement for service on the city Board of Directors is clearly arbitrary and without legitimate purpose. They particularly call attention to the lack of any minimum age qualification for the office of city councilman, or alderman for the mayor-council form of government under which many of the cities in Arkansas are organized.

It is elementary that the respective States, under the powers reserved to them by the Tenth Amendment to the Constitution of the United States, may determine the forms of local self-government to be established within their territory by their own constitutional and legislative processes. As early as Barnes v. District of Columbia, 91 U.S. 540 (1875), the Court recognized that:

> "A municipal corporation, in the exercise of all of its duties, including those most strictly local or internal, is but a department of the State. The legislature may give it all the powers such a being is capable of receiving, making it a minature State within its locality. Again:

> it may strip it of every power, leaving it a corporation in name only; and it may create and recreate these changes as often as it chooses. . . ." 91 U.S. 544, 545.

The State of Arkansas clearly had the reserved power to provide, as it has done, distinct and differing systems of local self-government for its cities and municipalities. We can conceive that different localities may have different needs as to their local governmental affairs. A mayor council form of local government is distinct and different from a city manager or city administrator form.

In addition to constituting the supreme legislative and executive body of the city, Ark. Stats. Anno. §19-704, the Board of Directors has the responsibility of selecting and employing an individual having special qualifications with respect to city government to serve as city manager, Ark. Stats. Anno. §19-712. The city manager has all the authority vested in the elected mayor under the mayor-council form of government. The Board of Directors must supervise the city manager and may terminate his employment at any time, with or without cause.

Thus, it is seen that the offices of city director and alderman or councilman carry with them dissimilar duties and responsibilities. In addition to the

legislative duties of the alderman or councilman, the city director has executive responsibility, and also must exercise considerable discretion in selecting and supervising a professional city manager. The statute, when enacted in 1921, was the first provision in the State of Arkansas for a form of government departing from the usual form having an elected, rather than selected and employed, executive. In consideration of the additional powers and duties it was entrusting to the Board of Directors, and the lack of the check and balance on their actions by an elected executive, the legislature might legitimately have concluded that a director should have more than minimal experience and maturity, and that one method to achieve this legitimate state end would be to set a minimum age qualification for the office.

We cannot say that a minimum age limitation is so unrelated to a reasonable assurance of minimal experience and maturity as to have no rational relationship to a legitimate state end. This is particularly so when we consider that such age qualifications have been used for that very purpose at all levels of government, being embodied even within the Constitution of the United States. The Twenty-sixth Amendment of the Constitution of the United States, on which plaintiffs base an assertion of a national policy of electoral responsibility at age eighteen, implicitly recognizes the necessity of setting some

minimum age for participation, even as a voter, in the process of government.

Plaintiffs ask: Why age thirty? Why not twenty-five or twenty-one or eighteen? Mr. Justice Holmes made the point a half century ago, as noted in Village of Belle Terre v. Boraas, 416 U.S. 1 (1974), Note 5, page 8:

> "When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark." Louisville Gas Co. v. Coleman, 277 U.S. 32, 41 (dissenting opinion).

In considering a similar issue wherein the Solicitor General contended that

Congress can set the age qualifications for voters in State elections under its power to enforce the Equal Protection Clause of the Fourteenth Amendment, Mr. Justice Black, speaking in Oregon v. Mitchell, 400 U.S. 112 (1970), at page 126, 127, stated:

> "Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race. Loving v. Virginia, 388 U.S. 1 (1967); Gomillion v. Lightfoot, 364 U.S. 339 (1960); Brown v. Board of Education, 347 U.S. 483 (1954); Slaughter-House Cases, 16 Wall. 36, 71-72 (1873). While this Court has recognized that the Equal Protection Clause of the Fourteenth Amendment in some instances protects against discriminations other than those on account of race, see Reynolds v. Sims, 377 U.S. 533 (1964); Hadley v. Junior College District, 397 U.S. 50 (1970); see also Kotch v. Board of River Port Pilots, 330 U.S. 552 (1947), and cases cited therein, it cannot be successfully argued that the Fourteenth Amendment was intended to strip the States of their power, carefully preserved in the original Constitution, to govern themselves. The Fourteenth Amendment was surely

> not intended to make every discrimination between groups of people a constitutional denial of equal protection. Nor was the Enforcement Clause of the Fourteenth Amendment intended to permit Congress to prohibit every discrimination between groups of people. On the other hand, the Civil War Amendments were unquestionably designed to condemn and forbid every distinction, however trifling, on account of race."

In accordance with its responsibilities, the General Assembly of the State of Arkansas exercised its legislative discretion in determining that a member of the Board of Directors should be not less than thirty (30) years of age. We cannot say that its determination is so wide of any reasonable mark as to fall afoul of the Equal Protection Clause. Whether the age qualification for the office should be revised downward is a matter which addresses itself to the General Assembly, not this Court.

This Court concludes that the plaintiffs have failed to sustain their burden of proving that the challenged provision of Act 99 of 1921, as amended is unconstitutional as being in violation of the Equal Protection Clause of the Fourteenth Amendment. We, therefore, hold that the statute

is a valid enactment of the General Assembly of the State of Arkansas and that it does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States; and that the claim of the plaintiffs should be dismissed with prejudice. The Clerk shall prepare order in accordance with this opinion

DATED: May 8, 1975.

_____

United States Circuit Judge

_____

United States District Judge

_____

United States District Judge

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JOHN W. WHITEHEAD and ROBERT YOUNG,

PLAINTIFFS,

v. Civil No. F-74-41-C

DARLENE WESTBROOK, CITY CLERK,
CITY OF FAYETTEVILLE, ARKANSAS,

DEFENDANT.

J U D G M E N T

On the 21st day of February, 1975, the above cause came on for hearing before the Three-Judge District Court designated by the Honorable Floyd R. Gibson, Chief Judge, Eighth Circuit Court of Appeals, the plaintiffs appeared by Mr. Morton Gitelman, their attorney, and the defendant appeared by Mr. James N. McCord, II, her attorney.

Following the arguments of counsel the case was submitted and taken under advisement by the court.

Now, having considered the pleadings filed herein, the briefs submitted by the parties and the arguments of counsel, the court has prepared and filed its Memorandum

Opinion relative thereto, and in accordance therewith,

IT IS ORDERED AND ADJUDGED that the statute is a valid enactment of the General Assembly of the State of Arkansas and that it does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, and that the complaint of plaintiffs be, and hereby is, dismissed with prejudice.

This the 21st day of May, 1975.

UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

JOHN W. WHITEHEAD and ROBERT YOUNG,	)	
PLAINTIFFS,	)	
v.	)	No. F-74-41-C
DARLENE WESTBROOK, CITY CLERK, CITY OF FAYETTEVILLE, ARKANSAS,	)	
DEFENDANT.	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that John W. Whitehead and Robert Young, plaintiffs above-named, appeal to the Supreme Court of the United States from the order and judgment dismissing the complaint in this action entered on May 21, 1975.

This appeal is taken pursuant to 28 U.S.C. §1253.

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Counsel for Plaintiffs

Supreme Court, U. S.
FILED
OCT 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

NO. 75-168

JOHN W. WHITEHEAD AND
ROBERT YOUNG ..... *Appellants*

v.

DARLENE WESTBROOK, CITY CLERK,
CITY OF FAYETTEVILLE, ARKANSAS ..... *Appellee*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

MOTION TO DISMISS

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1975

NO. 75-168

JOHN W. WHITEHEAD AND
ROBERT YOUNG ..... *Appellants*

v.

DARLENE WESTBROOK, CITY CLERK,
CITY OF FAYETTEVILLE, ARKANSAS ..... *Appellee*

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

MOTION TO DISMISS

Appellee, pursuant to Rule 16 (1)(d) of the Rules of the Supreme Court of the United States, moves the Court to dismiss the appeal herein on the following grounds:

1. The Supreme Court does not have jurisdiction to hear this direct appeal, because Ark. Stat. 19-704(f) is not a statute of general application and this case was not one required to be heard by a three-judge court.

2. The Supreme Court does not have jurisdiction to hear this direct appeal because appellants sought to restrain a local officer, not a state officer, from enforcing Ark. Stat. 19-704(f) and this case was not one required to be heard by a three-judge court.

STATEMENT OF THE CASE

A correct statement of the case appears at Pages 4-6 of appellants' Jurisdictional Statement.

QUESTIONS PRESENTED

The questions presented by this appeal are set out at pages 3-4 of appellants' Jurisdictional Statement.

1. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO HEAR THIS DIRECT APPEAL, BECAUSE ARK. STAT. 19-704(f) IS NOT A STATUTE OF GENERAL APPLICATION AND THIS CASE WAS NOT ONE REQUIRED TO BE HEARD BY A THREE-JUDGE COURT.

Appellants prosecute this direct appeal pursuant to 28 U.S.C. §1253. The Supreme Court has jurisdiction to review directly the lower Court's judgment only if the case was one required to be heard and determined by a three-judge court under 28 U.S.C. §2281. *Board of Regents of University of Texas System v. New Left Education Project*, 404 U.S. 541, 92 S. Ct. 652, 30 L. Ed. 2d 697 (1972); *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 69 S. Ct. 606, 93 L. Ed. 741 (1949). If there is a jurisdictional barrier, it binds the Court even if not invoked by appellee. *Rorick v. Board of Commissioners of Everglades Drainage District*, 307 U.S. 208, 59 S. Ct. 808, 83 L. Ed. 1242 (1939). The issue is not one of jurisdiction of the District Court as a Federal Court, but is whether a final hearing by three judges was required and hence, whether this Court has jurisdiction to hear the appeal. *Wilentz v. Sovereign Camp, W.O.W.*, 306 U.S. 573, 59 S. Ct. 709, 83 L. Ed. 994 (1939).

In order to give a three-judge court jurisdiction under 28 U.S.C. §2281, the suit must seek to have a state statute

declared unconstitutional and must seek to restrain the action of an officer of a state in the enforcement of such statute. *Ex parte Public National Bank*, 278 U.S. 101, 49 S. Ct. 43, 73 L. Ed. 202 (1928). The term "statute" does not include a state statute having only a local impact. *Board of Regents of University of Texas System v. New Left Education Project*, supra. Only a suit involving a statute of general application can invoke 28 U.S.C. §2281. A single judge, not a three-judge court, must hear the case where the statute is of only local import. *Moody v. Flowers*, 387 U.S. 97, 87 S. Ct. 1544, 18 L. Ed. 2d 643 (1967); *Rorick v. Board of Commissioners*, supra; *Ex parte Public National Bank*, supra; *Ex parte Collins*, 277 U.S. 565, 48 S. Ct. 585, 72 L. Ed. 990 (1928).

The statute attacked by appellants, Ark. Stat. 19-704(f), is clearly not a statute of "general application," since the only cities affected thereby are those having the city manager form of government. The parties stipulated that ten cities in Arkansas have the city manager form of government, while 32 cities with a population greater than 5,000 are organized under the mayor council form of government. In *Starr v. Parks*, 345 F. Supp. 795, (D. Md. 1972), the Court ruled that a three-judge Federal Court was not required where the policy under attack affected only four of twenty-four political subdivisions of the state. In the case at bar, even a smaller percentage of the state's political subdivisions are affected by Ark. Stat. 19-704(f). The statute can scarcely be described as one of state-wide concern. The vast majority of municipal corporations in Arkansas could not be affected by any pronouncement that a Federal Court might make on the constitutionality of Ark. Stat. 19-704(f).

Arguably, some cities now having the mayor council form of government could change to the city manager form in the future, if the electors so voted. Such a possibility, however, does not make Ark. Stat. 19-704(f) a statute of general application. This is especially true, in view of the fact that Ark. Stat. 19-701 provides in part that only cities having a population of 2,500 or more, according to the last preceding United States Census, may organize under the city manager form of government.[1]

2. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO HEAR THIS DIRECT APPEAL BECAUSE APPELLANTS SOUGHT TO RESTRAIN A LOCAL OFFICER, NOT A STATE OFFICER, FROM ENFORCING ARK. STAT. 19-704(f) AND THIS CASE WAS NOT ONE REQUIRED TO BE HEARD BY A THREE-JUDGE COURT.

A three-judge court may be invoked only when the suit is one to restrain state officers. *Wilentz v. Sovereign Camp, W.O.W.*, supra; *Ex parte Collins*, supra; *Ex parte Public National Bank*, supra. A "state officer" is one with authority to execute or administer a state-wide policy. *Stainback v. Mo Hock Ke Lok Po*, supra.

In the case at bar, appellants sought to restrain the City Clerk of the City of Fayetteville, Arkansas from enforcing Ark. Stat. 19-704(f). While the formal status of the official sued is not decisive, *Rorick v. Board of Commissioners of*

[1]Ark. Stat. Ann. 19-702 (Repl. 1968) provides in part:
"Any city within the State of Arkansas having a population of 2,500 or more, according to the last preceding United States Census, may become organized under the provisions of this Act (Sections 19-701 — 19-733) by proceeding as hereinafter provided. The form of government created by an organization under this Act is hereinafter called the management form of city government."

Everglades Drainage District, supra, the City Clerk in this case was not performing a state function within the meaning of 28 U.S.C. §2281, since the statute enforced did not embody a policy of state-wide concern. See *Spielman Motor Sales Company v. Dodge*, 295 U.S. 89, 55 S. Ct. 678, 79 L. Ed. 1322 (1935).

CONCLUSION

For the foregoing reasons, appellee moves that this appeal be dismissed. In the alternative, appellee moves that the Supreme Court vacate the judgment below and remand the case with instruction that the Court enter a fresh decree, so that appellants may be able, if they desire, to perfect a timely appeal to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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